

Advisory Council on Historic Preservation's Guidance for Coordinating NHPA Section 106 and NEPA Reviews

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I. Introduction

For over 40 years, the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) have ensured that preservation of our natural, cultural, and historic environment is afforded consideration in federal project planning. Both laws have been characterized by federal courts as requiring the federal government to “stop, look, and listen” prior to making decisions that will affect historic properties and the human environment, respectively. These laws are responsible for providing informed decision making at the federal level and have saved countless cultural resources that might have otherwise been expended or destroyed.

Federal agencies struggle with limitations on both time and resources to fulfill the requirements of NHPA and NEPA while meeting agency mission objectives. Better coordination of NHPA and NEPA offers opportunities to streamline the review processes, avoid unnecessary duplication of effort, meaningfully engage stakeholders, and ensure full consideration of the effects of federal projects on historic properties.

This guidance was prepared by a working group of ACHP member representatives at the request of the Chairman of the ACHP’s Federal Agency Programs Committee. [Add endorsement of CEQ if forthcoming.]

The intent of this guidance is to enhance federal agency decision making, increase awareness of opportunities to coordinate NEPA and Section 106 of NHPA reviews among federal project planning and resource experts, and to save time and public dollars by providing information about opportunities and best practices for coordinating NHPA and NEPA reviews.

This guidance also seeks to increase transparency and accountability regarding federal decision making. Streamlining the NHPA process through coordination with NEPA should ensure that all parties involved – including the public, State and Tribal Historic Preservation Officers, Indian tribes, Native Hawaiian organizations, federal decision makers, local governments, non governmental organizations, and cultural resource managers -- participate in a meaningful consultation that influences and adds value to federal decision making and results in our best efforts to balance to federal missions and needs with historic preservation concerns.

The target audience for this guidance is the project manager, environmental planner, and cultural resource manager employed by or on behalf of a federal agency or applicant for federal assistance. We encourage federal agencies to develop their own tailored guidance for coordinating NEPA and Section 106 based on the information presented here.

This document can provide NEPA and Section 106 practitioners with key concepts and strategies for coordinating Section 106 and NEPA compliance. These recommendations are not provided as a “how-to” manual. We recognize that many federal agencies have their own implementing regulations for NEPA, other administrative protocols for NEPA, and/or approved program alternatives for Section 106 compliance. These recommendations should serve as a foundation from which individual federal agencies may develop their own procedures or protocols that best suit their mission, the agencies’ framework for their programs, and the nature of specific undertakings, while meeting the requirements of both the NHPA and NEPA.

Congress established NEPA in 1969 to ensure that federal agencies assess environmental and cultural resource impacts resulting from proposed federal actions and provide tools necessary for informed

decision making. Federal agencies meet this requirement by completing the NEPA process defined in the Council on Environmental Quality's (CEQ's) regulations at 40 CFR Part 1500, et seq. NEPA and CEQ's regulations require the preparation of an Environmental Impact Statement (EIS) when a proposed major federal action may significantly affect the human environment. Historic properties are one aspect of the "human environment" defined by NEPA (see 40 CFR 1508.14). Consequently, one of the factors that must be considered in determining whether or not to prepare an EIS is historic preservation concerns. NEPA practitioners often describe the NHPA, along with a broad array of other federal environmental laws such as Endangered Species Act, Clean Air Act General Conformity, and the Marine Mammal Protection Act, as being "under the NEPA umbrella."

Congress enacted the NHPA in 1966 to ensure that federal decision makers consider historic properties during project planning. Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties and provide the ACHP an opportunity to comment prior to the approval of or expenditure of funds on a particular project or program. Federal agencies meet this requirement by completing the Section 106 process defined in the ACHP's regulations, "Protection of Historic Properties," (36 CFR Part 800).

The goal of the Section 106 process is to identify and accommodate historic preservation concerns within the federal project through consultation. The process provides for participation by state and local governments, Indian tribes and Native Hawaiian organizations, applicants for federal assistance, permits, or licenses, representatives from interested organizations, and private citizens as "consulting parties." Federal agencies and consulting parties attempt to reach agreement on measures to avoid, minimize, and mitigate adverse effects on historic properties and to find a balance between project goals and preservation objectives. The Section 106 regulations define a four-step process through which federal agencies achieve this goal:

Step 1: initiation of the process and establishing the undertaking,
Step 2: identification of historic properties,
Step 3: assessment of adverse effects, and
Step 4: resolution of adverse effects.

This guidance addresses a number of topics regarding Section 106 and NEPA coordination. First, we will address the opportunities and best practices for coordination of the two reviews in general terms. We will also discuss how historic properties are considered in determining the NEPA Class of Action or level of analysis and in evaluating alternatives for an action. We will also address the roles of participants in the Section 106 and NEPA reviews. Finally, we will compare and contrast the definitions of certain terms under the two statutes.

II. Road Map for Coordinating Compliance

NEPA and Section 106 both look to federal agencies to make project and program decisions in light of environmental impacts. NEPA has a broader reach of the entire environment (including historic places). Section 106 focuses on a narrower category, not every historic place, but a select list of those places that meet the National Register criteria. Coordinating compliance works best when Section 106 is considered in the early stages of the NEPA process.

[Sidebar: NEPA Process and Documentation in Lieu of Traditional Section 106 Process]

NEPA and Section 106 alike can be described as having two components: “process” and “documentation.” Process deals with the various steps required to support the agency’s decision-making and includes scoping, development of alternatives, assessment of impacts, mitigation and monitoring, public involvement, and decision-making. While the steps of these processes are not exactly equivalent, there are clear overlaps where information produced and decisions made influence subsequent steps in the process. The “documentation” component is the governmental record that supports how Agencies executed the established process and arrived at decisions along the way. The level of detail and analysis required in the documentation depends on the scale of the undertaking and its potential effects on the environment.

While NEPA analysis may require a more formalized process, the basic 4 steps of the 106 process complement and build upon the essential elements of the NEPA process for all classes of action.

[NEPA –Section 106 Steps Comparison Chart]

Step One: Scoping and Initiate Section 106 Review

Under NEPA, scoping is a critical step in formulating the proposed action and should incorporate and build on an agency’s experience with similar undertakings. Scoping is a broad term that refers to an agency or applicant’s initial evaluation or screening of the potential issues or areas of concern that will be associated with the project. The level and formality of scoping in the NEPA process depends on the level of NEPA analysis required. Scoping can involve contacting resource agencies such as State Historic Preservation Offices (SHPO), Tribal Historic Preservation Offices (THPO), and other agencies as well as involvement of potentially affected groups or entities with interest in the action or the effects of the action. Likewise, initiation of the 106 process involves identifying the appropriate participating agencies and other stakeholders to ascertain their level of interest and information they may bring to the process. This is also the time to lay out a plan for public involvement. The results of this scoping/initiation process will inform the appropriate level of information and analysis that is required to address both NEPA and 106.

It is usually during scoping that a Federal agency determines whether a NEPA categorical exclusion applies, whether an environmental assessment is needed, or whether an environmental impact statement process is triggered.

Categorical Exclusions.

Some types of federal activities (e.g. clerical work, payroll, or the purchase of equipment) have virtually no potential to affect the environment. Federal agencies do not typically document these types of categorical exclusions under NEPA. Similarly, an agency may determine that such actions are not Section 106 undertakings if they have no potential to affect historic properties. Here agencies can proceed without further coordination under either NEPA or Section 106.

[Sidebar: Categorical Exclusions and Section 106 Compliance]

Other activities may have some potential for triggering significant effects on the environment that would require a higher level of NEPA analysis and may be classified as Categorical Exclusions (CE). Actions or undertakings under these NEPA categorical exclusions may require the Section 106 process to be carried out beyond Step 1 to determine if a higher level of NEPA analysis is warranted. A determination of adverse effect in the Section 106 process is an indicator, but not a determining factor that a higher level of consideration is warranted under NEPA. Regardless of the approach taken, Federal agencies should be mindful and use the rule of reason to guide their determination on this regard.

Environmental Assessments (EA) and Environmental Impact Statements (EIS)

Scoping for EAs/EISs are more formal than that for categorical exclusions and may trigger consultation and coordination with regulatory agencies, including Tribes, Native Hawaiian organizations, special interest groups, and the public. These entities may have subject matter expertise in a particular area of the action or its impacts or have jurisdiction by law over some element of the project. The President's Council on Environmental Quality (CEQ) encourages the use of cooperating agencies in these cases to assist in the development of the NEPA process and documentation. Federal agencies have the opportunity to request SHPOs, THPOs, Tribes, and Native Hawaiian organizations that might attach religious and cultural significance to resources in the affected area to become cooperating agencies under NEPA. It also provides an opportunity to request other Federal agencies, such as the National Park Service or the Advisory Council on Historic Preservation, to become cooperating agencies when the identification and assessment of effects steps of the Section 106 process indicate a high level of complexity (e.g. impacts to National Historic Landmarks, public controversy, interpretation of the regulations, or Tribal issues).

Step 2: Identifying Alternatives & Identify Historic Properties

Environmental impact statements require consideration of alternatives that would address the purpose and need for action. For environmental assessments consideration of alternatives is needed when there are "unresolved conflicts concerning alternative uses of available resources." Information and determinations gathered in the Section 106 process can inform whether alternatives to address adverse effects to historic properties will need to be considered in the NEPA process. Federal agencies and applicants can elect to plan, design, or modify their proposals to avoid or minimize adverse effects to historic properties in such a way that a no adverse effect determination can be reached. This would eliminate the need to identify additional alternatives under NEPA to take into account the action or undertakings impact on historic properties. Agencies and applicants may also elect to follow through the entire Section 106 process and include the mitigation or other measures to avoid, minimize, or mitigate the adverse effects into the description of the proposal or various alternatives. The ACHP regulations provide that the scope and timing of identification and assessment of effects under the Section 106 process may be phased to reflect the agency or applicant's consideration of alternatives in NEPA.

Step 3: Assessment of Impacts & Assess Adverse Effects

After the identification of the alternatives, the NEPA process requires the analysis of the environmental impacts of each. The NEPA regulations establish that alternatives must be treated equally in the evaluation process. This means that the analysis should not be skewed to favor one alternative over another including impacts to historic properties identified during the 106 process.

When alternatives are required, carrying out the Section 106 process for all alternatives will assist in informing the NEPA process identifying whether the impacts to historic properties are significant. The

level of effort of Section 106 analysis (identification and evaluation) for each alternative should be commensurate with the complexity of the proposal, controversy associated with impacts to historic properties, and initial assessment of the expected impacts of each alternative. The scoping process will assist in weighing these factors. Identification of additional alternatives may trigger the need for establishing different areas of potential effects (APE) to take into account the nature of each and the assessment of adverse effects to different kinds of historic properties.

Carrying out the Section 106 process during the identification of NEPA alternatives may reduce the range of alternatives needed to take into account the action's impact on historic properties. Another approach to make the assessment of impacts manageable is to establish through the scoping process, and in consultation with the SHPO, THPO, Tribes, and affected Native Hawaiian organizations, the depth of analysis needed to determine the adverse effects of each viable and feasible alternative on historic properties. Factors to consider include the nature of the historic properties, the number of historic properties that may be affected by a particular alternative, and the nature of the undertaking.

Step 4: Mitigation & Resolve Adverse Effects

The NEPA process provides opportunities for considering mitigation measures – avoidance, minimization, rectification, reduction over time, and compensation – at various points in the process including during scoping, formulation of the proposal and alternatives, after the assessment of impacts, and after opportunity for public review. Similarly, the Section 106 process provides for opportunities for the consideration of avoidance, minimization, or mitigation measures during assessment and resolution of adverse effects stages. If adverse effects cannot be avoided then Step 4 would be triggered for their resolution. Resolution of adverse effects may result in alternate treatment measures that offset the loss of a historic property. Federal agencies and applicants should incorporate the treatment measures developed under the Section 106 process in their NEPA analysis to ensure a coordinated process.

[Sidebar: Cultural Resources beyond Historic Properties]

The resolution of adverse effects to historic properties through the Section 106 process does not, in of itself, prove the lack of significant impacts to historic properties under NEPA but is a factor to consider in this determination. It is important to note that CEQ allows the finding of no significant impact (FONSI) based on mitigation that would reduce the impacts of an action below the threshold of NEPA significance. When these mitigated FONSI are established for actions with adverse effects to historic properties, agencies and applicants must clearly convey this in their analyses and ensure that there is an adequate mechanism for monitoring compliance with these measures. This can include the development and reference to memoranda of agreement (MOAs) or programmatic agreements (PAs) under the Section 106 process.

NEPA and Section 106 Documentation

NEPA documentation, whether for an EIS, EA, or CE, records the results of the Federal agency's analysis and the impacts of project implementation on the environment. Public input and comment on the proposed action is gathered during the preparation of EAs and EISs which assists decision-makers to make a reasoned choice among alternatives.

Environmental Assessments and Environmental Impact Statements are designed for a public audience, while documentation associated with Section 106 consultation is often lengthy, detailed, and technical in order to provide sufficient information to understand the nature of the historic properties involved and the adequacy of the adverse effect determinations and findings. Thus NEPA documentation often

includes only a summary of the information generated by the Section 106 process. Agencies and applicants are encouraged to append or incorporate by reference in the NEPA documentation those documents, findings, analyses and letters developed or produced for the Section 106 process.

[Sidebar: Substituting NEPA Documentation for Section 106 Reporting]

Categorical Exclusions

An agency's administrative record must demonstrate the applicability of a CE to a particular activity and that the potential for extraordinary circumstances has been considered. Documentation prepared in the Section 106 process, such as correspondence with SHPO, THPO, and Tribes can be incorporated by reference as evidence of lack of extraordinary circumstances that deal with historic properties.

Environmental Assessments

Environmental assessments are meant to be concise documents that describe the: need for the action; alternatives considered; analysis of impacts; and, parties consulted. In deciding the amount and detail of Section 106 technical material to incorporate into the EA, Federal agencies and applicants should take into account the complexity of the action, potential for adverse effects to historic properties, and general interest by outside parties on the impacts of the action on historic properties. NEPA EA preparers may find useful to develop a section on historic properties when historic properties will be adversely affected. This will help focus the attention of reviewers and interested parties on the efforts conducted under the Section 106 process to address adverse effects to historic properties. Agencies that rely on the resolution of adverse effects in the Section 106 process to reduce the level of significance and reach a FONSI should clearly state this in the Mitigated FONSI document.

Environmental Impact Statements

The documentation required environmental impact statement document is more prescriptive as laid out in 40 C.F.R. 1502.10 through 1502.18. It should contain enough information to determine the significance of the environmental impacts of the action but should not be encyclopedic in nature. The CEQ NEPA regulations provide various practices to ensure that the volume of material provided in an EIS does not become unwieldy. As with EAs, Federal agencies should take into account the potential for adverse effects to historic properties and general interest by outside parties on the impacts of the action on historic properties in deciding the amount and detail of information from the Section 106 process to provide in the EIS.

Public Review and Incorporation of Comments

Both the NEPA and Section 106 processes encourage public involvement and participation throughout the process. This public involvement requirement is more prescriptive in the NEPA process, particularly as it relates to actions that trigger the EIS process. Agencies and applicants may also have and follow agency procedures that provide some level of public involvement for actions requiring environmental assessments. Agencies and applicants should coordinate the public involvement requirements and expectations of both processes to the maximum extent practical.

[Sidebar: Consultation under NEPA and NHPA]

Selection and Approval of the Proposed Action

At the end of the NEPA process, federal agencies select a preferred alternative and approve its execution. The NEPA determination could be a categorical exclusion determination or documentation, a Finding of No Significant Impact (FONSI) for environmental assessments, or a Record of Decision (ROD) for Environmental Impact Statements. The Section 106 process ends with a no historic properties

affected, no adverse effect, or adverse effect determination. For undertakings where adverse effects cannot be avoided, federal agency executes a document, usually a Memorandum of Agreement (MOA) or a Programmatic Agreement (PA), which stipulates the treatment measures agreed to by the signatory parties. Agencies should remember that even after they have reached a NEPA decision, circumstances surrounding the project may change, as new information develops about the undertaking or as the project itself is altered, that would require reopening of the Section 106 process.

[Sidebar: Agencies must conclude Section 106 Process before Issuing NEPA Decisions]

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III. Considering Historic Properties in Determining the NEPA Analysis

A common issue confronting many Federal agencies engaged in the NEPA and Section 106 processes is when to determine that an “undertaking” with adverse effects on historic properties requires a higher level of NEPA analysis. Recent data reveals that the vast majority (90 to 95%) of federal actions do not have the potential to significantly impact the environment. At the same time, the majority (80-85%) of undertakings reviewed by State Historic Preservation Offices under the 106 process end with a finding of no historic properties affected. In order to better coordinate NHPA and NEPA compliance, Federal agencies need reasonable guidelines for assessing the significance under NEPA of an Adverse Effect under Section 106.

Categorical Exclusions and Adverse Effects on Historic Properties

NEPA categorical exclusions (CEs) are agency-defined categories of actions that, based on past experience with similar actions, do not individually or cumulatively have significant environmental impacts and therefore are exempt from the requirement to prepare an EA or EIS. In their NEPA procedures, agencies are required to specifically define “extraordinary circumstances” as those atypical situations when a normally excluded action may have significant environmental effects. The existence of “extraordinary circumstances” can require the preparation of an EA or EIS. Most Federal agencies have defined the presence of historic properties and the potential for an action to significantly impact those “protected resources” as a threshold where a CE should not be applied. Some agencies have NEPA guidance that permits adverse effects on historic properties under a Categorical Exclusion.

The CEQ definition of categorical exclusions describes a contrast between “typical” and “atypical” actions and supports agencies using their experience with multiple projects, or their inexperience with new types of projects, to inform their creation, use, and evaluation of this form of NEPA analysis. Recent draft guidance from the Council on Environmental Quality recommends that: “the need for lengthy documentation should raise questions about whether applying the categorical exclusion in a particular situation is appropriate.” In addition, federal undertakings which require Section 106 consultation with multiple interested parties may not be ripe for the application of a categorical exclusion.

Context and Intensity of Impacts to Historic Properties

Federal agencies establish the type of NEPA analysis based upon the context and intensity of the proposed action, rather than the type of environmental issues that may be present at a particular project area. Some agencies’ regulations include examples of projects that may have significant impacts. For example, the establishment of large federal facilities on new sites or the construction of a new four-lane highway would normally require an EIS, while smaller developments on existing facilities might warrant consideration by an Environmental Assessment (EA). Conducting an EA involves the determination of the action’s significance, or context and intensity of likely environmental impacts. Context is defined as the “geographic, biophysical, and social context in which the effects will occur.” Intensity refers to the “severity of the impact, in whatever context(s) it occurs.”

One approach to developing a threshold for impacts to historic properties is to consider the level of significance of the resource as its “context” and the severity of the proposed impacts as the action’s “intensity.” While the ACHP has defined seven examples of adverse effects in the Section 106 regulations, historic preservation professionals generally recognize that not all adverse effects are created equal. Refining the definition of the severity of impacts to historic properties requires that federal agencies have clearly defined the specific characteristics that make an individual property or district eligible for the National Register. In most circumstances, historic preservation practitioners

would agree that an action that would completely degrade the integrity of a National Historic Landmark to the point of delisting would necessitate preparation of an EIS.

Of course, a final ingredient in all levels of NEPA analysis is the spice of public controversy. Many NEPA practitioners have learned, through experience, that certain classes of historic properties have the potential for higher levels of public concern. Generally, the potential for an adverse effect on human remains within a project area should be a clear indication of probable controversy. Impact on unique, last surviving, extremely old, or nationally significant resources also present this potential for higher levels of public concern. NEPA analysis must account for the level of public controversy regarding a particular action or program.

Resolution of disputes regarding the level of analysis and adverse effect determinations.

During the conduct of Section 106 reviews, Federal agencies typically are guided by formal NEPA standard procedures and informal agency practices when determining whether to prepare a CE, EA or EIS. The vast majority of federal actions are categorically excluded from higher levels of NEPA analysis. Thus, federal agencies and local governments often conclude Section 106 reviews where an adverse effect determination has been reached and MOAs or PAs executed within the lowest level of NEPA analysis.

In order to avoid these potential problems, agencies should consider the following issues when deciding how to handle their Section 106 and NEPA compliance:

- Will the Section 106 agreement document need to be addressed in a broader environmental context in order for the agency to complete its NEPA review or bolster its NEPA record?
- Is the adverse effect on historic properties which results from the undertaking of a magnitude that not only the historic property loses integrity, but may result in long term, indirect, or cumulative impacts beyond its boundary?
- Has project planning and the consideration of alternatives evolved to the point that the Federal agency understands the overall impacts to the historic properties, particularly NHL's, historic sites, and groupings or large concentrations of historic properties?
- What would be the consequence of using the Federal agency's CE guidelines if the undertaking had to be reviewed for possible litigation?
- Would the limited CE record be sufficient to successfully handle the litigation? If a more comprehensive record is deemed necessary to sustain the CE, is that a sign that a sign that maybe an EA should be more closely considered?

IV. Evaluating Alternatives: Considering Historic Properties in the Development of NEPA Alternatives

One significant aspect of the NEPA and Section 106 processes that could benefit from closer coordination is the evaluation of alternatives. The NEPA regulations consider alternatives to be the heart of the NEPA analysis. Similarly, the Section 106 regulations direct agencies to develop and evaluate alternatives or modifications that could avoid, minimize or mitigate adverse effects on historic properties. For both processes, the analysis of alternatives is critical because they provide flexibility for Agency officials to make informed decisions that protect resources, and avoid or minimize impacts while meeting an Agency's mission and needs in a timely and cost effective manner. Unfortunately, the development of alternatives under NEPA frequently occurs before an Agency has reached a determination about an action's impact on historic properties pursuant to Section 106. As a result, the Agency's NEPA alternatives may not reflect important information about the impacts to historic properties. Likewise, the Agency's ability to develop and evaluate alternatives as part of the Section 106 process is substantially limited by the Agency's commitment to specific alternatives. Coordinating and integrating information that is relevant to the Section 106 process regarding historic properties and cultural resources during the formulation of NEPA alternatives will help lead to more informed alternatives that reflect the level of potential impacts to these resources and provide support for the Agency's obligations under Section 106.

This chapter provides useful tips to help Agencies formulate and evaluate NEPA alternatives for Environmental Assessments and Environmental Impact Statements in a way that complements and informs the Section 106 process. More specifically, the objective of this guidance is:

- to ensure that the administrative record addresses alternatives that
- meet the purpose and need of the project;
- to help the Agency more efficiently meet its obligations under NEPA and NHPA;
- to promote the development of alternatives that have minimal or no potential impact on historic properties; and
- to serve the Agency stewardship role of preserving cultural resources and historic properties.

Formulating Alternative that Consider Historic Properties and Cultural Resources

Agencies are required to develop and analyze a reasonable range of alternatives to a proposed action regardless of whether or not the Agency has direct or indirect jurisdiction or it has permitting or assisting jurisdiction. In either instance, Agencies often use in-house expertise. One practical recommendation is to include in the alternative development process preservation/cultural resources experts with knowledge and/or sensitivity to local historic traditions and history. Incorporating this expertise into the alternatives process will assist the decision makers in digesting historic resources information in a way that could help develop specific alternatives that avoid or minimize impacts on historic properties, or at least provide a general understanding of how alternatives impact historic properties. In identifying and evaluating a reasonable range of alternatives, the Agency should seek to incorporate the following information about historic properties and cultural resources ideally revealed during the scoping process and with the assistance of a preservation/cultural resources expert. An Agency should consider:

- Identification of known historic properties in the proposed project area, especially National Historic Landmarks (NHLs) and properties significant to Native Americans, e.g., traditional cultural properties. Understanding the relationship of these highly significant and sensitive resources can influence changes or adjustments in alternatives that are aimed at avoiding potential impacts, particularly for NHLs mandate a higher level of analysis, 16 U.S.C. § 470h-2(f).
- Geographic location of an alternative and the proximity to identified historic properties.
- Setting and context for the alternative in relation to the historic properties. Visual effects resulting from an alternative may not be readily apparent, but could ultimately cause the action to have an adverse effect on historic properties or a negative impact on cultural resources.
- Intensity and scope of the alternative with respect to historic properties.
- NEPA defined effects – remember to consider that there can be both temporary (e.g., construction) and permanent effects from an alternative.
- Direct effects caused by the alternative and associated visual, auditory, atmospheric impacts on or near a historic property. (40 C.F.R. § 1508.8 (a)).
- Indirect effects from the alternative and associated visual, auditory, atmospheric impacts on or near a historic property. (40 C.F.R. § 1508.8 (b)).
- Assessment of potential to result in cumulative impacts - incremental effects from the alternative from all previous, existing and reasonably foreseeable actions on or near a cultural resource or historic property. (40 C.F.R. § 1508.7)).
- Input from SHPO/THPO, Tribes, Native Hawaiian Organizations, non-governmental organizations, public interest groups, local communities, and other consulting parties that relate to alternatives.

Agencies should be especially mindful of alternatives that could result in an aesthetic effect that might have a negative impact on cultural resources or an adverse effect on historic properties. Such effects are often caused by eliminating open space, obstructing a scenic view, or simply introducing visual element(s) that are incompatible, out of scale, in great contrast, or out of character with the surrounding area. These effects, as suggested above, can be harder to evaluate when the cultural resource is not an historic property because it will require that the Agency directly ask the community and other stakeholders to articulate the public reasons for significance of the cultural resource.

Data Needs

Data gathering and networking is crucial to the development of a record that will support adequate decisions during the consideration NEPA alternatives. In addition to the recommendation to include a preservation/cultural resources specialist early in the NEPA process, the ACHP recommends that Agencies reach out to knowledgeable entities during the alternative development process for NEPA. Such networking may lead to an appropriate level of information about cultural resources and historic properties and help to integrate a discussion of these resources in the NEPA process.

For example, the following offices and organizations can provide assistance (in no particular order):

- Federal Agency Federal Preservation Officer
- Cultural resource contacts at other Federal agencies
- State Historic Preservation Office
- Tribal Historic Preservation Office
- Community leaders/Local Governments

- Cultural Resource/Heritage Preservation Advocacy Groups

Additionally, there is generally a fair amount of information already collected that can support the consideration of cultural resources and historic properties in formulating alternatives. ACHP encourages Agencies to take full advantage of web-based information, where possible. These sources of information include:

- National Register of Historic Places
- State Historic Preservation Office web sites
- NHPA Section 110 Surveys
- Existing Programmatic Agreements for Cultural Resources
- Agency/location specific Cultural Resource Management Plans (e.g., DoD ICRMP)
- Previously conducted NHPA Section 106 and NEPA documentation (e.g., EA/EIS)
- Oral history interviews
- Sample field investigation
- Field surveys

While these factors and informational sources assist in the development of preliminary alternatives, Agencies will still need to follow up with outside experts because not all relevant information is available in print, on the internet, or in databases.

Hierarchy for Historic Properties

In situations where the primary environmental consideration is historic properties, ACHP recommends the following hierarchy within NEPA alternatives (most preferred to least preferred):

- Alternative avoids adverse effects to historic properties
- Alternative incorporates and enhances the characteristics of historic properties
- Alternative designed to minimize impacts to historic properties
- Agency proposes to mitigate impacts from the alternative
- Agency could reconsider proposal and decide on the No-action alternative
- Alternative accepts the loss or alteration and mitigates through recordation.

The Section 106 consultation process can play a significant role in the development and consideration of alternatives in the NEPA process to address the impacts of the Federal action/undertaking on historic properties. Practitioners should recognize the dynamic interaction that occurs between the NEPA and Section 106 processes and allow adequate opportunity to fully develop and explore alternatives. Since Section 106 is a consultative process, the evaluation of new and modified alternatives will likely be discussed during meetings with stakeholders. Follow up by the agency may be required along with the possible consideration of new alternatives. Accordingly, alternatives outlined in draft NEPA documents disseminated to the public should not be perceived as limiting an agency's responsibility to consider new alternatives. The administrative record should document all relevant discussions and reviews associated with the evaluation of alternatives. Likewise, the final NEPA documents should reflect the alternatives fully considered by the agency during both the NEPA and Section 106 reviews.

V. Roles of Participants

Consultation vs. Public Involvement

The cornerstone of Section 106 is the consultation process. Consultation is defined in the regulations:

- Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them.

The Section 106 process includes several specific consultation requirements. While NEPA requires disclosure of federal findings and determinations, as well as federal agency decision-making, the form and style of communication among federal and non-federal parties is often quite different in Section 106 consultation and the NEPA process. NEPA does not provide for consultation (as defined above) with consulting parties. Rather, NEPA emphasizes and requires public disclosure. A member of the public may participate in the NEPA process by attending public hearing and meetings, and reviewing and providing comments on NEPA documents. The substantive back and forth discussion or negotiation that should take place in Section 106 consultation does not necessarily occur in the NEPA review process. The Section 106 process also requires a federal agency to “seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the [f]ederal involvement in the undertaking.” Many agencies have found that for some or all of their undertakings, it is appropriate and effective to conduct public outreach as required for both Section 106 and NEPA compliance in a coordinated effort. Section 106 consultation would be required and completed in addition to any such coordinated public outreach.

The NEPA regulations state that federal agencies shall,

- *Make diligent efforts to involve the public in preparing and implementing their NEPA procedures, and*
- *Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected*

The Section 106 regulations authorize a federal agency to use its own procedures for public involvement under NEPA or other program requirements in lieu of the general public (as opposed to consulting party) involvement requirements of Section 106, if they provide adequate opportunities for public involvement consistent with the Section 106 process.

Federal Agencies

The NHPA and NEPA are both statutory requirements for Federal agencies. An Agency official who has jurisdiction over the undertaking is ultimately responsible for Section 106 compliance. However, recognizing that not all Agency officials have the appropriate professional standards to make determinations about historic properties, the use of contractors is allowed for the development of analyses and recommendations regarding historic properties. The Agency official is responsible for ensuring that the information contained in those analyses and recommendations meet the applicable standards. In NEPA, an agency may require an applicant to submit environmental information from which the Agency can then develop the appropriate NEPA documentation. It is the Agency's responsibility to independently verify the accuracy of the submitted information.

Applicants

Those who apply for Federal assistance, or a permit, license or approval, are allowed to participate in the Section 106 process as a consulting party. The applicant may be authorized by the Federal agency to initiate the consultation process, but the Agency official remains legally responsible for all findings and determinations. For an applicant to initiate the Section 106 process, the Federal agency must notify the SHPO/THPO. While the applicant may begin the consultation process, the Federal agency remains responsible for any government to government consultation with Indian tribes. As previously stated, in NEPA, an applicant may provide information to the Federal agency for the development of NEPA documentation, but should make every effort to ensure that the information provided is accurate and verifiable.

SHPO/THPO

In Section 106, a federal agency is required to consult with the State Historic Preservation Officer (SHPO), or, as named, a Tribal Historic Preservation Officer (THPO). The SHPO is responsible for maintaining the statewide inventory of historic properties, as well as assisting Federal agencies in meeting their Section 106 responsibilities. Tribes have the ability to assume the responsibilities of the SHPO for Section 106 purposes on tribal lands. In those instances where a THPO has been appointed and the undertaking takes place on or affecting historic properties on tribal lands, the Federal agency should consult with the THPO in lieu of the SHPO.

Indian Tribes and Native Hawaiian Organizations

Both NEPA and Section 106 involve federally-recognized tribes. Section 106 acknowledges Indian tribes and Native Hawaiian organizations specifically as consulting parties in the consultation process. Any consultation must recognize the government-to-government relationship that exists between the Federal government and Indian tribes. No matter where the property of religious or cultural significance may be located, an Indian tribe or Native Hawaiian organization may act as a consulting party in the Section 106 process. Indian tribes that attach either religious or cultural significance to historic properties are asked to identify concerns about historic properties, as well as advise on identification efforts, and participate in the resolution of any adverse effects to such historic properties. For those tribes that have not assumed the responsibilities of the SHPO, or for those undertakings/actions off tribal land, the Federal agency may have the responsibility to consult with the SHPO as well as the THPO or a tribal representative. Additional information about consultation requirements can be found in guidance from the Advisory Council on Historic Preservation.

Local Governments

If an undertaking is located in the jurisdiction of a local government, a representative of that local government is entitled to consulting party status within the Section 106 process. Under other Federal law provisions, the local government may act as the designated Agency official for the purposes of Section 106. However, this delegation of responsibility does not exist for NEPA. In those cases where the local government has the responsibility for Section 106, the information that is collected is passed on to the Federal agency to be included in the NEPA documentation.

The Public

In both NEPA and Section 106, the public's views are essential to making informed decisions and considering historic properties. Under NEPA, the public has a responsibility to review environmental documents, and to offer comments on them. This may be accomplished through a variety of measures, including publication in the *Federal Register*, publication in local newspapers, posting on and off site within the project's location, or public meetings. Under NHPA, the public reviews the agency's undertaking as well as its effects on historic properties, and offers comments on both. The Federal

agency will consider those comments in a way that reflects the nature and complexity of the undertaking on historic properties and its effects on historic properties, and the relationship of the Federal involvement to the undertaking. When appropriate, the Federal agency may substitute existing NEPA or other program requirements in lieu of public participation requirements found in Section 106. However, adequate participation must be provided for when using other program requirements.

The Advisory Council on Historic Preservation

The Advisory Council on Historic Preservation is responsible for overseeing Federal agencies' compliance with the Section 106 regulations, and providing comments on individual or classes of undertakings as appropriate. Appendix A to 36 CFR § 800 identifies the criteria for Council involvement in reviewing individual Section 106 cases:

The undertaking has substantial impacts to historic properties (includes both adverse effects to properties of a rare or noteworthy type);

- The undertaking presents questions of policy;
- The undertaking presents questions of procedural nature; or
- The undertaking presents issues of concern to Indian tribes or Native Hawaiian organizations.

When one or more of these criteria are met, the Council may exercise its right to involve itself as a consulting party to the undertaking.

Additionally, the Council must be invited to participate in consultation when there are direct, adverse effects to National Historic Landmarks.]

VI. Definitions and Translations

NEPA & Section 106: Comparisons of Terms

<i>Term/Phrase</i>	<i>NEPA</i>	<i>NHPA</i>	<i>Comments</i>
Context	"Context" is the geographic, biophysical, and social context in which the effects will occur. The regulations mention society as a whole, the region, and affected interests as examples of context. Considering contexts does NOT mean giving greater attention to, say, effects on society as a whole than to effects on a local area. On the contrary, the importance of a small-scale impact must be considered in the context of the local area, not dismissed because it does not have impacts on larger areas	"Historic context" or "context" is background information gathered to evaluate the historic significance of a historic property	
Unique characteristics	A term used to describe a project's significance and/or the geographic area of the project	A term used to describe the elements of a historic property that make it eligible for listing in the NR	
Significance/Significant	Used to describe the level of impact of a proposed action may have. "Context" and "intensity" have to be evaluated when assessing significance	Used to describe the historic resource that has certain character defining features that make it historically significant and therefore eligible for listing in the NR	

Historical/Cultural Resource	In NEPA these two terms are not synonymous, and cover a wider range of resources.	Historical” or “Historic properties” are used interchangeably in 36 CFR 800. “Historic property” is the correct term: any “prehistoric or historic district, site, building, structure, or object listed in or eligible for listing in the NR.	Cultural resources (NPS-28, appendix A) — Aspects of a cultural system that are valued by or significantly representative of a culture or that contain significant information about a culture. A cultural resource may be a tangible entity or a cultural practice. Tangible cultural resources are categorized as districts, sites, buildings, structures, and objects for the National Register of Historic Places, and as archeological resources, cultural landscapes, structures, museum objects, and ethnographic resources for NPS management purposes.
Mitigation	Mitigation can be the action of altering a project in the proposal stages to change the project’s possible impacts, or mitigation at the end of the process, to offset the adverse result.	When an undertaking is found to have an adverse effect on a historic property, which cannot be avoided, and therefore the adverse effect can be resolved through mitigation.	Mitigation (1508.20) — A modification of the proposal or alternative that lessens the intensity of its impact on a particular resource.

Undertaking (106) Major Federal Action(NEPA)			Major federal action (1508.18) — Actions that have a large federal presence and that have the potential for significant impacts to the human environment. They include adopting policy, implementing rules or regulations; adopting plans, programs, or projects; ongoing activities; issuing permits; or financing projects completed by another entity.
Consulting parties (106) Stakeholders (NEPA)			
Consultation (Section 106) Public Involvement (NEPA)			
Adverse effect (106) Significant Impact (NEPA)			
Intensity (severity)	"Intensity" refers to the severity of the impact, in whatever context(s) it occurs. The regulations require that a number of variables be addressed in measuring intensity. Negligible, minor, moderate, or major intensity		
Duration	Short-term, long-term, permanent		

Type of effects/impacts	Beneficial impact Adverse impact	Adverse effect No adverse effect Direct effects Indirect effects Cumulative effects	Impact topics — Specific natural, cultural, or socioeconomic resources that would be affected by the proposed action or alternatives (including no action). The magnitude, duration, and timing of the effect to each of these resources is evaluated in the impact section of an EA or an EIS.
Cumulative effects	Cumulative effects -- the "straws that break the camel's back." An individual action may not have much effect, but it may be part of a pattern of actions whose effects ARE significant. For example, widening a bridge may not itself have much effect, but it may be the last piece of highway improvement that allows rampant development of a pristine valley.		
Indirect effects	Indirect effects such as causing economic change in a community that changes the environment over the long run (through development, increased taxes, etc.), or causing long-term erosion in a watershed.		Indirect impact (1508.8) — Reasonably foreseeable impacts that occur removed in time or space from the proposed action. These are "downstream" impacts, future impacts, or the impacts of reasonably expected connected actions (e.g., growth of an area after a highway to it is complete).

Direct effects	Direct effects such as actually changing an ecosystem, filling a wetland, knocking down a building, digging up an archeological site.		Direct effect (1508.8) — An impact that occurs as a result of the proposal or alternative in the same place and at the same time as the action.
Human environment	Human environment (1508.14) — Defined by CEQ as the natural and physical environment, and the relationship of people with that environment (1508.14). Although the socioeconomic environment receives less emphasis than the physical or natural environment in the CEQ regulations, NPS considers it to be an integral part of the human environment.		
Scoping	Scoping (1508.25) — Internal decision-making on issues, alternatives, mitigation measures, the analysis boundary, appropriate level of documentation, lead and cooperating agency roles, available references and guidance, defining purpose and need, and so forth. External scoping is the early involvement of the interested and affected public.		

Sidebars

Sidebar: NEPA Process and Documentation In Lieu of Traditional Section 106 Process:

This guidance on coordinating NEPA and Section 106 compliance does not address the regulatory option, found in [36 CFR 800.8(c)], that allows agencies to substitute the NEPA process and documentation in lieu of the traditional Section 106 process. This combined process is essentially a very well coordinated application of the recommendations outlined above in that the standards for conduct of the NEPA process and preparation of the accompanying documentation meet the standards of the 106 process as well. Consulting parties under the 106 process are identified during the NEPA scoping process and afforded the opportunity to comment at appropriate stages of the process. Identification of historic properties and assessment of effects are carried out in a manner consistent with the standards and criteria under the 106 regulations, including input from consulting parties. Consultation to resolve adverse effects identified must include opportunity for input from the full range of consulting parties. Finally documentation produced for the NEPA process must meet the standards set by the 106 process.

Sidebar: Categorical Exclusions and Section 106 Compliance

Exclusion from NEPA does not mean that the activity is automatically excluded from the Section 106 process. Agencies must consult the criteria cited at 36 CFR 800.3(a)(1) to determine whether a categorically excluded project is subject to further consideration under Section 106.

Sidebar: Cultural Resources beyond Historic Properties

Agencies should be mindful that the Section 106 process addresses impacts to historic properties and is not a surrogate or substitute for the evaluation of those cultural resources beyond historic properties. NEPA requires consideration of impacts to cultural resources, which is a broader category than impacts to historic properties.

Sidebar: Substituting NEPA Documentation for Section 106 Reporting

Generally documentation prepared for an EA or an EIS does not satisfy the documentation needed for a successful Section 106 consultation process. Agencies seeking to substitute NEPA documentation must execute the ACHP's regulations for the use of NEPA in lieu of the traditional Section 106 process (36 CFR 800.8(c)).

Sidebar: Consultation under NEPA and Section 106

Agencies and applicants should be mindful that the 30 day public comment period for Environmental Assessments or Environmental Impact Statements does not satisfy the consultation requirements under Section 106 process, and that the Section 106 consultation requirements does not satisfy the public involvement requirement of the NEPA process, although with careful organization meetings and comment periods may do both.

Sidebar: Agencies must conclude Section 106 Process before Issuing NEPA Decisions

Agencies and applicants should wait for the conclusion of the Section 106 process before making a categorical exclusion determination, issuing a FONSI or issuing the ROD because the Section 106 process will provide evidence to support the NEPA determination and assist the decision-maker in selecting the alternative, particularly when adverse effects to historic properties are likely and because the statutory provisions of Section 106 require the process to be concluded before agency approval of an action.